ANALYSIS OF AB 2222
AMENDING THE
FAIR EMPLOYMENT AND HOUSING ACT
WITH REGARD TO
DISABILITY DISCRIMINATION

The following is an annotated copy of AB2222, which amended the Fair Employment and Housing Act with regard to disability discrimination. All DPA comments that follow are in large, bold, italic font. These comments are not part of the original bill, but have been done by DPA staff in order to highlight important areas of change, and to help explain the impact of those changes.

In order to bring attention to the most important new provisions in this law, we have highlighted in red type the sections that contain important changes which will affect the way this law is applied by State Personnel Offices. Other, still important prior provision, are in bold type. In order to identify every new change, recipients will have to compare this law with the prior one. All significant changes to the law have been highlighted in red, however.

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THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS: SECTION 1. This act shall be known and may be cited as the Prudence Kay Poppink Act. **SECTION 2. Section 51 of the Civil Code is amended to read:** **51. (a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.** (b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. (c) This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, or medical condition. (d) Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall anything in this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws. (e) For purposes of this section: (1) "Disability" means any mental or physical disability as defined in Section 12926 of the Government Code. (2) "Medical condition" has the same meaning as defined in subdivision (h) of Section 12926 of the Government Code. (f) A violation of the right of any individual under the Americans with Disabilities Act of 1990.	***Note that this section amends a civil rights law, not the FEHA. It is making the definitions of disability and medical condition in the civil rights law identical to the FEHA, for the sake of consistency.***

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(Public Law 101-336) shall also constitute a violation of this section.	
SECTION 3. Section 51.5 of the Civil Code is amended to read:	***Note that this section amends a civil rights law, not the FEHA. It is making the definitions of disability and medical condition in the civil rights law identical to the FEHA, for the sake of consistency.***
51.5. (a) No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state because of the race, creed, religion, color, national origin, sex, disability, or medical condition of the person or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics. (b) As used in this section, "person" includes any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company. (c) This section shall not be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws. (d) For purposes of this section: (1) "Disability" means any mental or physical disability as defined in Section 12926 of the Government Code. (2) "Medical condition" has the same meaning as defined in subdivision (h) of Section 12926 of the Government Code.	
SECTION 4. Section 54 of the Civil Code is amended to read:	***Note that this section amends a civil rights law,***

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54. (a) Individuals with disabilities or medical conditions have the same right as the general public to the full and free use of the streets, highways, sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics, and physicians' offices, public facilities, and other public places. (b) For purposes of this section: (1) "Disability" means any mental or physical disability as defined in Section 12926 of the Government Code. (2) "Medical condition" has the same meaning as defined in subdivision (h) of Section 12926 of the Government Code. (c) A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section.	***not the FEHA. It is making the definitions of disability and medical condition in the civil rights law identical to the FEHA, for the sake of consistency.***
SECTION 5. Section 12926 of the Government Code is amended to read: 12926. As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context: (a) "Affirmative relief" or "prospective relief" includes the authority to order reinstatement of an employee, awards of backpay, reimbursement of out-of-pocket expenses, hiring, transfers, reassignments, grants of tenure, promotions, cease and desist orders, posting of notices, training of personnel, testing, expunging of records, reporting of records, and any other similar relief that is intended to correct unlawful practices under this part. (b) "Age" refers to the chronological age of any individual who has reached his or her 40th birthday. (c) "Employee" does not include any individual employed by his or her parents, spouse, or child, or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility. (d) "Employer" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows:	***This is one of the key provisions of the FEHA that was changed by AB2222. Please pay particular attention to the changes noted below in definitions!***

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"Employer" does not include a religious association or corporation not organized for private profit. (e) "Employment agency" includes any person undertaking for compensation to procure employees or opportunities to work.	
(f) "Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential functions" does not include the marginal functions of the position. (1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following: (A) The function may be essential because the reason the position exists is to perform that function. (B) The function may be essential because of the limited number of employees available among whom the performance of that job can be distributed. (C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function. (2) Evidence of whether a particular function is essential includes, but is not limited to, the following: (A) The employer's judgment as to which functions are essential. (B) Written job descriptions prepared before advertising or interviewing applicants for the job. (C) The amount of time spent on the job performing the function. (D) The consequences of not requiring the incumbent to perform the function. (E) The terms of a collective bargaining agreement. (F) The work experiences of past incumbents in the job. (G) The current work experience of incumbents in similar jobs.	***The definition of "essential functions" was not changed by AB2222, but is a critical piece in the understanding of the concept of "reasonable accommodation".***
(g) "Labor organization" includes any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances,	

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terms or conditions of employment, or of other mutual aid or protection. **(h) "Medical condition" means either of the following:** (1) Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer. **(2) Genetic characteristics. For purposes of this section, "genetic characteristics" means either of the following:** **(A) Any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, that is known to be a cause of a disease or disorder in a person or his or her offspring, or that is determined to be associated with a statistically increased risk of development of a disease or disorder, and that is presently not associated with any symptoms of any disease or disorder.** **(B) Inherited characteristics that may derive from the individual or family member, that are known to be a cause of a disease or disorder in a person or his or her offspring, or that are determined to be associated with a statistically increased risk of development of a disease or disorder, and that are presently not associated with any symptoms of any disease or disorder.**	***AB2222 grants people with "medical conditions" many of the same rights and protections under the law that formerly were only granted to those with "physical" or "mental disabilities". This is a very problematic development, because the current definition of "medical condition" encompasses people with certain "genetic characteristics" not "presently associated with any symptoms of any disease or disorder". (However, note that, under §12940(o), which was added to the FEHA in 1999, an employer cannot subject an employee or applicant to a test for the presence of a specific genetic characteristic. So, the employee must inform the employer that he or she carries such a gene. Otherwise, the employer has no way of knowing that this medical condition exists, since, by definition, it is***

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	asymptomatic.) ***Unlike the definitions of "physical" and "mental disability" contained in this law, the definition of "medical condition" is not linked to a "limitation in performing a major life activity". Thus, the employer is required to engage in an interactive process with an employee who has a medical condition in order to determine whether to grant he or she a "reasonable accommodation". The employer has this obligation whether or not this "medical condition" affects the employee's ability to do the essential functions of the job, or, whether or not the employee currently exhibits any symptoms of the disease or disorder. (See, amended language of §12940(n) in section 7 of this bill.)*** ***Also, note that the definition of "medical condition" has been***

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	slightly changed under AB2222. Previously, one of the groups defined in the definition of "medical condition" was cancer "survivors". The new definition includes anyone with a "diagnosis of cancer or a record or history of cancer". Thus, it now includes people with currently active cancer.
(i) "Mental disability" includes, but is not limited to, all of the following: (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity.	***The new definition of "mental disability" makes this definition consistent with that of "physical disability", with regard to the requirement that the disability limit a "major life activity". Previously, there was no specific language requiring that the mental condition or disorder cause a "limitation" in performing a major life activity. The California courts were divided as to whether or not the "limitation" requirement for mental disabilities should be implied in the law. The Legislature fixed this ambiguity with this change. This is probably***

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	the only provision in AB2222 that <u>restricts</u>, rather than expands the law's coverage.
For purposes of this section: (A) "Limits" shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.	***The Legislature substantially expanded the coverage of the disability discrimination law by enacting this provision, which prohibits employers from taking into account mitigating measures when evaluating whether a person is "limited" in a major life activity. This provision is a direct rejection of the U.S. Supreme Court's recent holdings that an employer can take mitigating factors into account when evaluating whether a person is disabled.***
(B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.	***This definition of "limits" is new language in the law. It remains to be seen how the term "difficult" will be interpreted by the courts.***
(C) "Major life activities" shall be broadly construed and shall include physical, mental, and social activities and working. (2) Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services.	***This definition of "major life activities" has been added to the law by AB2222. It is an***

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	extremely broad definition, which includes "social activities". Under this new definition, employees who are limited in their ability to participate in "social" activities, because of mental impairments, are "disabled" and can avail themselves of all the protections of the FEHA.
(3) Having a record or history of a mental or psychological disorder or condition described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.	***Not only does the law apply to people who currently have disabilities, it has also been expanded to apple to people who have a "record or history" of mental disability. This change makes the FEHA consistent with the ADA, which has always covered people with a "record" of a mental impairment. However, it remains to be seen how the courts will interpret the meaning of the word "record" versus the meaning of the word "history" under this change.***
(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult.	***Not only does the law apply to people who <u>currently have</u> "mental***

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(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in paragraph (1) or (2). "Mental disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.	***disabilities", or who have a record or history of mental disabilities, it has now been expanded to include employees who have been "regarded as" being mentally disabled by their employer. This is consistent with the ADA. In 1999, the FEHA was amended to prohibit discrimination against employees who were "regarded" as having, or having had, a physical impairment, as defined by the Act. In 2000, the Legislature extended the "regarded as" disabled category to the mental impairment arena.*** ***This is a troublesome aspect of the law for employers, especially where "return to work" decisions are in dispute. There are many cases in which a person wants to return to work but is kept off work by the employer because of ambiguous doctors' reports. In refusing to reinstate the employee, it is argued that the employer is "regarding the employee***

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	as disabled". Thus, the employer risks being held liable for "failing to reasonably accommodate", or for disability discrimination by "regarding" someone as disabled who is not. This can occur if a court holds that the employee was not disabled at the time he/she requested a return to work. (See the recent Ingersoll SPB Precedential Decision No. 00-01 for an application of this theory, where the employee won a $25,000 award.) Thus, this section can be a trap for the unwary.
(k) "Physical disability" includes, but is not limited to, all of the following: **(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:** **(A) Affects one or more of the following body systems:** **neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.** (B) Limits a major life activity. For purposes of this section: (i) "Limits" shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable	***As in the case of mental disabilities, the Legislature has substantially expanded the coverage of the disability discrimination law applicable to those with "physical" disabilities by enacting this provision, which prohibits employers from taking into account mitigating measures when***

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accommodations, unless the mitigating measure itself limits a major life activity.	***evaluating whether a person is "limited" in a major life activity. This provision is a direct rejection of the U.S. Supreme Court's recent holdings interpreting the ADA that an employer CAN take mitigating factors into account when evaluating whether a person is disabled.***
(ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.	***This definition of "limits" is new to the FEHA. It remains to be seen how the term "difficult" will be interpreted by the courts.***
(iii) "Major life activities" shall be broadly construed and includes physical, mental, and social activities and working.	***This definition of "major life activities" has been added to the law. It is an extremely broad definition, which includes "social activities". Under this new definition, employees who are limited in their ability to participate in "social" activities, because of physical impairments, are "disabled" and can avail themselves of all the protections of the Act.***
(2) Any other health impairment not described in paragraph (1) that requires special education or	

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related services. (3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.	***Not only does the law apply to people who currently have disabilities, it has also been expanded to apple to people who have a "record or history" of physical disability. This change makes the FEHA consistent with the ADA, which has always covered people with a "record" of a physical impairment. However, it remains to be seen how the courts will interpret the meaning of the word "record" versus the meaning of the word "history" under this change.***
(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult. **(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).**	***Not only does the law apply to people who currently have disabilities, or who have a record or history of disabilities, it also includes employees who have been "regarded as" being physically disabled by their employer. (This was added to the FEHA in 1999 amendments.) "Regarding" someone as disabled has always been***

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	an ADA concept.
(6) "Physical disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs. (l) Notwithstanding subdivisions (i) and (k), if the definition of "disability" used in the Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (i) or (k), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (i) and (k). (m) "Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation" includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics. (n) "Reasonable accommodation" may include either of the following: (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities. (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. (o) "Religious creed," "religion," "religious observance," "religious belief," and "creed" include all aspects of religious belief, observance, and practice. (p) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. (q) "Sexual orientation" means heterosexuality,	

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homosexuality, and bisexuality. (r) "Supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment. (s) "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors: (1) the nature and cost of the accommodation needed, (2 the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility, (3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities, (4) the type of operations, including the composition, structure, and functions of the workforce of the entity, and (5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities. SECTION 6. Section 12926.1 is added to the Government Code, to read: 12926.1. The Legislature finds and declares as follows: (a) The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (Public Law 101-336). Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections.	***Everyone should read this statement of intent by the Legislature. This statement has the force of law, since it has been made a statute.*** ***First of all, note the reference to "protecting" people who are "perceived" to be disabled. Is the Legislature using the term "perceived" as the equivalent of the term***

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	"regarded as"? In the law, these phrases do not necessarily have the same meaning. Nuances concerning the intent of the employer can be important.
(b) The law of this state contains broad definitions of physical disability, mental disability, and medical condition. It is the intent of the Legislature that the definitions of physical disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual **or perceived** physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling. (c) Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease. In addition, the Legislature has determined that the definitions of "physical disability" and "mental disability" under the law of this state require a "limitation" upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a "substantial limitation." This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990.	
Further, under the law of this state, "working" is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.	***This statement of intent by the Legislature with regard to the major life activity of "working" will severely burden the***

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(d) Notwithstanding any interpretation of law in Cassista v. Community Foods (1993) 5 Cal.4th 1050, the Legislature intends (1) for state law to be independent of the Americans with Disabilities Act of 1990, (2) to require a "limitation" rather than a "substantial limitation" of a major life activity, and (3) by enacting paragraph (4) of subdivision (i) and paragraph (4) of subdivision (k) of Section 12926, to provide protection when an individual is erroneously or mistakenly believed to have any physical or mental condition that limits a major life activity. (e) The Legislature affirms the importance of the interactive process between the applicant or employee and the employer in determining a reasonable accommodation, as this requirement has been articulated by the Equal Employment Opportunity Commission in its interpretive guidance of the Americans with Disabilities Act of 1990.	***employer. Prior to this statute, under the EEOC regulations interpreting the ADA, employees could not be "substantially limited in the major life activity of working" unless they provided evidence that they were substantially limited in performing a "broad class or range of jobs". This regulation was a critical tool in defending against "failure to reasonably accommodate" claims, where the accommodation requested was, for example, a change of supervisor. The federal cases made unequivocally clear that the inability to get along with one supervisor, or the inability to do the essential functions of one particular job, was NOT being "substantially limited in the life activity of working". Therefore, those employees were not entitled to a change of supervisor as a reasonable accommodation. As a result of the above***

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	statutory statement of intent, however, California employers cannot use this legal argument as a basis for denying an employee a change of supervisor as a reasonable accommodation.
SECTION 7. Section 12940 of the Government Code is amended to read: 12940. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: (a) For an employer, because of the race, religious creed, color, national origin, ancestry, **physical disability, mental disability, medical condition**, marital status, sex, or sexual orientation of any person, **to refuse to hire or employ the person** or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, **or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.**	***This section of the bill addresses the key statutory obligations of employers under the FEHA with regard to disabled employees. Subsection (a) is the provision prohibiting employers from discriminating against employees on the basis of various protected classes, including mental and physical disability and medical condition. This provision was NOT changed by AB2222. Note the bolded phrases.***
(1) **This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability**, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, **where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that**	***Subsection (a)(1) is critical to employers because it sets forth the rule that a mentally or physically disabled person CAN be terminated if he/she cannot do the essential functions of the***

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would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations. (2) **This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.** Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform his or her essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. (3) Nothing in this part relating to discrimination on account of marital status shall do either of the following: (A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission. (B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents. (4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam era veterans. (b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation of any person, to exclude, expel or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate	***job. This was also not changed by AB2222. Note the bolded phrases.*** ***Subsection (a)(2) is also critical to employers because it sets forth the rule that a person with a "medical condition" can likewise be terminated if he/she cannot do the essential functions of the job. This was not changed by AB2222. Note the bolded phrases.***

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against any person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer. (c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation of the person discriminated against. (d) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry of an employee or applicant, either verbal or through use of an application form, that expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation, or any intent to make any such limitation, specification or discrimination.	
(e) (1) Except as provided in paragraph (2) or (3), for any employer or employment agency to require any medical or psychological examination of an applicant, to make any medical or psychological inquiry of an applicant, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition. **(2) Notwithstanding paragraph (1), an employer or employment agency may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation.** **(3) Notwithstanding paragraph (1), an**	***The medical inquiry provisions of AB2222 are entirely new in the FEHA. They severely restrict the employer's right to make health inquiries of applicants or employees. As a result of this legislation, the State Personnel Board has revised the state's health questionnaire. A draft is currently on the SPB's***

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employer or employment agency may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that the examination or inquiry is job-related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry. **(f) (1) Except as provided in paragraph (2), for any employer or employment agency to require any medical or psychological examination of an employee, to make any medical or psychological inquiry of an employee, to make any inquiry whether an employee has a mental disability, physical disability, or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.** **(2) Notwithstanding paragraph (1), an employer or employment agency may require any examinations or inquiries that it can show to be job-related and consistent with business necessity. An employer or employment agency may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite.** (g) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code that prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities. (h) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part. (i) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under	***Website for review. Also note that, under subsection Government Code section 12940(o), <u>infra.</u>, an employer cannot subject an applicant or employee to a test for the presence of a genetic characteristic. (This was added to the law in 1999 amendments.)***

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this part, or to attempt to do so. (j) (1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment. (2) The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment. (3) An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action. (4) (A) For purposes of this subdivision only, "employer" means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities. The definition of "employer" in subdivision (d) of Section 12926 applies to all provisions of this section other than this subdivision. (B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer" does not include a religious association or corporation not organized for private profit. (C) For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment	

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based on pregnancy, childbirth, or related medical conditions. (5) For purposes of this subdivision, "a person providing services pursuant to a contract" means a person who meets all of the following criteria: (A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance. (B) The person is customarily engaged in an independently established business. (C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work. (k) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring. (l) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance.	

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(m) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.	***Subsection (m) is the section of the FEHA which makes it an unlawful employment practice to fail to make reasonable accommodation for the known disabilities of an applicant/employee. This subsection was not changed by AB2222. Note that it only refers to accommodating the known "physical or mental disability" of an applicant/employee. There is NO requirement under this provision to reasonably accommodate employees with known "medical conditions".***
(n) For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.	***Subsection (n) was added to the FEHA by AB2222. It imposes a mandatory obligation on employers to engage in a timely, good faith, interactive process with an applicant/employee in order to determine effective reasonable accommodations. This obligation is triggered by a request for reasonable accommodation made by***

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	an applicant/employee with a "known physical or mental disability or known medical condition". This subsection has created an anomaly in the law. While (n) requires an employer to respond to a request for reasonable accommodation from a person with a known medical condition, (m) does not require that an employer reasonably accommodate people with "medical conditions". Thus, while employers are required to engage in the interactive process with employees with medical conditions, the law does not now require the employer to reasonably accommodate them.
(o) For an employer or other entity covered by this part, to subject, directly or indirectly, any employee, applicant, or other person to a test for the presence of a genetic characteristic.	***This provision prohibits testing for genetic characteristics. Employers cannot discriminate against people with certain types of genetic characteristics, and they are also prohibited from testing for those characteristics. This provision was added***

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	to the law in 1999 and is highlighted in this analysis because of its interrelationship with the medical inquiry sections.
SECTION 8. Section 12955.3 of the Government Code is amended to read: 12955.3. For purposes of this part, "disability" includes, but is not limited to, any physical or mental disability as defined in Section 12926.	***This change to §12955.3 incorporates the same definitions of disability found in §12926 in the law prohibiting discrimination in the design of multifamily dwellings.***
SECTION 9. Section 19231 of the Government Code is amended to read: 19231. As used in this article, "individual with a disability" means any individual who has a physical or mental disability as defined in Section 12926.	***AB2222 also amends §19231 of the civil service code which contains the state's policy favoring the hiring of disabled individuals. It incorporates the same definitions of disability as are found in the FEHA.***
SECTION 10. Section 5.5 of this bill incorporates amendments to Section 12926 of the Government Code proposed by both this bill and Assembly Bill 2142. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2001, (2) each bill amends Section 12926 of the Government Code, and (3) this bill is enacted after Assembly Bill 2142, in which case Section 5 of this bill shall not become operative.	
SECTION 11. Section 7.5 of this bill incorporates amendments to Section 12940 of the Government Code proposed by both this bill and Assembly Bill 1856. It shall only become	

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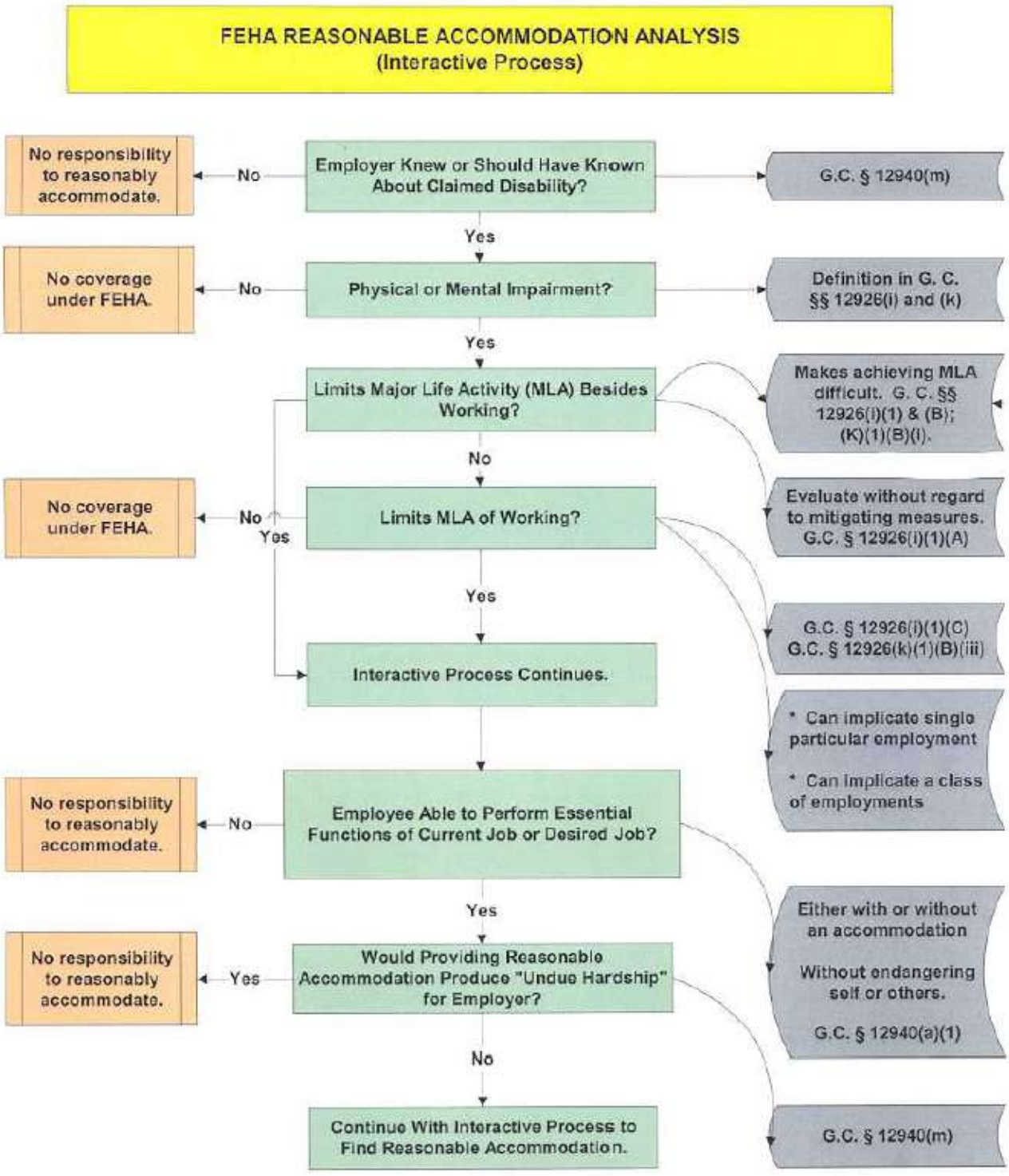
operative if (1) both bills are enacted and become effective on or before January 1, 2001, (2) each bill amends Section 12940 of the Government Code, and (3) this bill is enacted after Assembly Bill 1856, in which case Section 7 of this bill shall not become operative.	


FEHA REASONABLE ACCOMMODATION ANALYSIS
(Interactive Process)
Employer Knew or Should Have Known About Claimed Disability?
No
No responsibility to reasonably accommodate.
G.C. § 12940(m)
Yes
Physical or Mental Impairment?
No
No coverage under FEHA.
Definition in G. C. §§ 12926(i) and (k)
Yes
Limits Major Life Activity (MLA) Besides Working?
Makes achieving MLA difficult. G. C. §§ 12926(i)(1) & (B); (K)(1)(B)(i).
No
Limits MLA of Working?
No
Yes
No coverage under FEHA.
Evaluate without regard to mitigating measures. G.C. § 12926(i)(1)(A)
Yes
G.C. § 12926(i)(1)(C)
G.C. § 12926(k)(1)(B)(iii)
Interactive Process Continues.
* Can implicate single particular employment
* Can implicate a class of employments
Employee Able to Perform Essential Functions of Current Job or Desired Job?
No
No responsibility to reasonably accommodate.
Yes
Either with or without an accommodation
Without endangering self or others.
G.C. § 12940(a)(1)
Would Providing Reasonable Accommodation Produce "Undue Hardship" for Employer?
Yes
No responsibility to reasonably accommodate.
No
Continue With Interactive Process to Find Reasonable Accommodation.
G.C. § 12940(m)